

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Petition for Declaratory Ruling that tw	)	WC Docket No 11-119
telecom inc Has the Right To Direct IP-to-IP	)	
Interconnection Pursuant to Section 251(c)(2)	)	
of the Communications Act, as Amended, for	)	
the Transmission and Routing of tw telecom's	)	
Facilities-Based VoIP Services and IP-In-The-	)	
Middle Voice Services		

**REPLY COMMENTS OF THE  
NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION  
AND THE  
ORGANIZATION FOR THE PROMOTION AND  
ADVANCEMENT OF SMALL TELECOMMUNICATIONS COMPANIES**

**I. INTRODUCTION**

The National Telecommunications Cooperative Association (“NTCA”)<sup>1</sup> and the Organization for the Promotion and Advancement of Small Telecommunications Companies (“OPASTCO”)<sup>2</sup> (the “Associations”), hereby submit these reply comments in response to Public Notice released by the Federal Communications Commission (the “Commission”) seeking comment on a Petition for Declaratory Ruling filed by tw telecom, inc (“TWTC”).

TWTC asks the Commission to declare that it has rights under Section 251(c)(2) of the Communications Act of 1934, as amended (the Act), to establish direct

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<sup>1</sup> NTCA represents more than 570 rural rate-of-return regulated telecommunications providers. All of NTCA’s members are full service ILECs and many of its members provide wireless, cable, Internet, satellite and long distance services to their communities.

<sup>2</sup> OPASTCO is a national trade association representing approximately 460 small incumbent local exchange carriers (ILECs) serving rural areas of the United States. Its members, which include both commercial companies and cooperatives, together serve more than 3 million customers.

interconnection on an Internet Protocol (“IP”) basis with incumbent local exchange carriers (“ILECs”) for the transmission and routing of its facilities-based VoIP services as well as its IP-in-the-middle services. TWTC also seeks a declaration that such services are telecommunications services and either telephone exchange services and/or exchange access.

Each of the Associations’ members is a “rural telephone company” as defined in the Act.<sup>3</sup> As such, none is subject to the requirements of 47 U.S.C. § 251(c)(2) unless and until its exemption from the rule is challenged and lost.<sup>4</sup> However, the issues raised in this proceeding are of great consequence since they extend beyond the confines of Section 251(c). The framework under which IP-to-IP interconnection is made available and regulated is one of increasing importance to the Associations’ memberships as services and the networks on which they are offered evolve.

## **II. IP-BASED INTERCONNECTION SHOULD BE MADE AVAILABLE PURSUANT TO SECTION 251 OF THE ACT, BUT ONLY SUBJECT TO LONG-STANDING LIMITATIONS THEREUNDER.**

The Associations support a declaration that, to the extent that a telecommunications carrier utilizes IP-enabled technology in the provision of a telecommunications service, that carrier shall be entitled to demand and obtain interconnection on an IP-to-IP basis subject to Section 251 of the Act. Indeed, this right should apply to any functionality (including interconnected VoIP or IP-in-the-middle) whereby a *telecommunications carrier* is ultimately using that functionality to deliver a *telecommunications service* to an end user and requires interconnection with other carriers to support the exchange of such traffic between those customers and the

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<sup>3</sup> 47 U.S.C. § 153(37).

customers served by those other carriers. In these cases, the IP technology is simply a network layer used to deliver a service that is then subject to all of the rights and obligations of Title II. The mere use of that technology within the network should neither disqualify the service from being eligible for Section 251 interconnection, nor excuse it from the statutory obligations otherwise applicable to telecommunications services.

In this regard, the Associations firmly agree with the Nebraska Companies that the Commission “should not allow the transition to IP to weaken or eliminate the interconnection rights or the financial rights, responsibilities and obligations of interconnecting carriers who are subject to the Commission’s order.”<sup>5</sup> Public Knowledge points out that the PSTN has enduring value and the Commission should not abandon time-tested regulatory goals, such as quality service, traffic nondiscrimination, and fair relationships between carriers in the push to “retire” the PSTN.<sup>6</sup>

To be clear, however, this right should only apply where the requesting carrier is, in fact, a telecommunications carrier using some IP-enabled functionality to deliver a telecommunications service to its end user. Where a requesting provider is using IP technology to deliver something that it asserts is a non-telecommunications service (*e.g.*, something that provider self-classifies as an “enhanced” interconnected voice over Internet protocol (VoIP) service), the Commission should confirm that a carrier is not required to provide any interconnection pursuant to Section 251 (or Section 252, where applicable) to that requesting provider.<sup>7</sup>

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<sup>4</sup> See 47 U.S.C. § 251(f)(1).

<sup>5</sup> Comments of the Nebraska Companies, p. 7.

<sup>6</sup> Comments of Public Knowledge, pp 3-4.

<sup>7</sup> Of course, the question presented by the TWTC petition would be much easier to resolve if the Commission would finally make an affirmative determination of the classification of all interconnected VoIP and similar services. In the absence of such a determination, however, it is at least clear that a

TWTC purports in its Petition to offer a service to its customers that enables voice communication via transmission from one customer to another. The technology underlying the communication is irrelevant to its classification or to the form of interconnection it might then obtain. Any provider that carries information to a location of the user's choosing, without changing the form or content of the information, is providing telecommunications,<sup>8</sup> and in delivering this service to the public for a fee is providing a telecommunications service.<sup>9</sup> TWTC's service carries the voice of a speaker from one party to another. In every respect, IP-based telephone services are thus the functional equivalent of traditional telephone service.<sup>10</sup> As TWTC itself states, it would be "hard to find services that fit more squarely within the definition of telecommunications service than TWTC's facilities-based VoIP services."<sup>11</sup> Thus, at least in the case of TWTC, the record supports the conclusion that the service TWTC provides is a telecommunications service and that TWTC is a telecommunications carrier. As a result, for TWTC (and other similarly situated providers) the service as well as the entity offering that service would meet the threshold for seeking regulated interconnection (whether IP or otherwise) pursuant to Section 251. However, absent those factual predicates (*i.e.*, a telecommunications service offered by a telecommunications carrier), no such IP-IP interconnection right under Section 251

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provider cannot obtain interconnection pursuant to Section 251 except where it is a "telecommunications carrier" using the IP technology or other functionality in connection with provision of a "telecommunications service." In the case of a telecommunications carrier that offers wholesale service, that carrier must meet the requirements of 51.100 that permits information service traffic on a connection only if the connection is primarily used for "telecommunications" traffic.

<sup>8</sup> 47 U.S.C. § 153(43).

<sup>9</sup> *Id.* at § 153(46).

<sup>10</sup> TWTC Petition at 3. It is noteworthy that Section 153(46) defines a telecommunications service by reference to functionality, and "regardless of the facilities used."

<sup>11</sup> TWTC Petition at 10.

would exist. Thus, the Associations respectfully requests that the Commission confirm that TWTC or any other similarly situated carrier is entitled to seek Section 251 IP-to-IP interconnection provided there is a factual determination that the requesting party is a telecommunications carrier providing telecommunications services..

**III. IN CONFIRMING THAT IP-BASED INTERCONNECTION IS SUBJECT TO SECTION 251, THE COMMISSION SHOULD NOT CREATE NEW INTERCONNECTION OBLIGATIONS FOR ILECS - THE EXISTING REGIME UNDER SECTION 251 MUST APPLY IN ALL RESPECTS.**

In its Petition, TWTC starts with a reasonable request but then overreaches. Specifically, after seeking IP-to-IP interconnection, it argues for a presumption that interconnection for the exchange of facilities-based VoIP is technically feasible.<sup>12</sup> It requests that ILECs bear a heavy burden in proving technical infeasibility to state regulatory commissions.<sup>13</sup>

Even if IP-based interconnection should be made available pursuant to Section 251, the Commission should deny this further portion of the TWTC request and confirm that nothing in any Order creates any *new* obligations on ILECs or other carriers receiving a request for interconnection. Rather, the Commission should make clear that IP-based interconnection is but one of many means of achieving interconnection, and that all of the applicable limitations of interconnection under Section 251 apply with equal force to IP-to-IP interconnection.

Specifically, of import to IP-based interconnection, the Commission should ensure that a requesting carrier's rights under Section 251 are limited to those situations in which both parties (*i.e.*, the requesting carrier *and* the carrier receiving the request)

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<sup>12</sup> *Id.* at 20.

<sup>13</sup> *Id.* at 21.

have already deployed IP trunking capabilities. It is well established that a requesting carrier cannot force an ILEC to upgrade its facilities or deploy new functionalities to accommodate its interconnection request. The 8<sup>th</sup> Circuit Court of Appeals declared long ago that Section 251(c)(2) requires access “only to an incumbent LEC’s existing network – not to a yet unbuilt superior one.”<sup>14</sup> This is equally true for Section 251(a), which captures a lower threshold for interconnection.

USTelecom points out, “in order to provide for direct IP-to-IP interconnection, ILECs would need to purchase and deploy IP gateways along with other facilities to exchange and transport in IP, as well as network equipment to convert the traffic to TDM for switching and termination on its existing network.”<sup>15</sup> Under TWTC’s argument, the costs of upgrades simply to accommodate IP-based interconnection would be borne by the ILEC’s customers, even as the beneficiary of the requirement would be a requesting carrier such as TWTC. The law, as interpreted by the 8<sup>th</sup> Circuit, is very clear that interconnection requirements do not require an upgrade by the carrier receiving the request. Interconnection obligations attach only when *both* parties have the requisite technical capability. The ILEC need not upgrade its network to “cater to every desire of every requesting carrier.”<sup>16</sup>

Even if requiring superior forms of interconnection could lawfully be required (which under *Iowa Utilities Bd.* it cannot), the creation of superior interconnection rights for IP-based interconnection would be particularly problematic for small rural ILECs. Indeed, even if they are not subject to Section 251(c) interconnection obligations because

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<sup>14</sup> *Iowa Utilities Bd. V. FCC* 120 F. 3d 753, 813 (8<sup>th</sup> Cir. 1997).

<sup>15</sup> Comments of USTelecom, p. 3.

<sup>16</sup> *Iowa Utilities Bd.*, 120 F.3d at 813.

of the rural exemption, it must also be made clear that rural ILECs are under no obligation pursuant to Section 251(a) to supply IP-based interconnection unless and until the rural ILEC has provisioned and is using IP trunking capabilities within its own network. There is no statutory basis to suggest Section 251(a) can afford any duty with respect to interconnection that is beyond those of Section 251(c).

The Commission should therefore reject TWTC's efforts to take what begins as a reasonable request (at least) one step too far. Instead, the Commission should clarify that while IP-based interconnection may be a reasonable means of achieving interconnection under Section 251 of the Act, this does not create any new rights with respect to such interconnection that do not already exist under the long-standing Section 251 framework.

#### **IV. FURTHER COMMISSION INVOLVEMENT IS ESSENTIAL AS NETWORKS AND SERVICES EVOLVE.**

Finally, the Associations disagree with TWTC's assertion that the Commission need not establish regulations governing IP-to-IP interconnection.<sup>17</sup> Rather, as the Nebraska companies explain, regardless of any broader classification debate and whether or not Sections 251 and 252 may govern in a given instance, there is a pressing need to develop further regulations around how and where providers will interconnect with one another on an IP-to-IP basis. In an evolving broadband environment, this critical question should not be left to "commercial negotiations." Commission failure to address these issues will undermine, if not doom, the Commission's objectives with respect to broadband deployment and affordability, as providers who control critical IP links will be able with increasing frequency to assert their dominance during and after the migration to all-IP, broadband-centric networks.

It may be true, as TWTC observes, that “numerous details” for IP-to-IP interconnection must still be worked out in bilateral negotiations between incumbent LECs and competitors.<sup>18</sup> But in an environment where the Commission is attempting to drive (or at least keep pace with) a rapid transition to IP-enabled networks and broadband-based services, it would be a serious error for the Commission to leave the details of IP-to-IP interconnection for another day. Parties need clarity and disclosure on basic technical/operational issues to avoid uncertainty and conflicting policies. Commission involvement is prudent, and the Associations therefore support the Nebraska Companies’ request that the Commission move forward promptly with a proceeding to address IP-to-IP technical standards.<sup>19</sup>

#### **IV. CONCLUSION**

The Associations support TWTC’s assertion that IP-based interconnection should be made available pursuant to Section 251 of the Act. The right should only apply where the requesting carrier is, in fact, a telecommunications carrier using some IP-enabled functionality to deliver a telecommunications service to its end user.

However, TWTC is over-reaching in its request, attempting to create new rights and obligations beyond the long-standing interconnection framework. It is well established that a requesting carrier cannot force an ILEC to upgrade its facilities or deploy new functionalities to accommodate its interconnection request. The Commission should ensure that a requesting carrier’s rights under Section 251 are limited to those situations in which both parties have already deployed IP trunking capabilities.

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<sup>17</sup> TWTC Petition at 21.

<sup>18</sup> TWTC Petition at 21.

<sup>19</sup> Comments of Nebraska Companies at 12.



The Associations disagree with TWTC on further Commission involvement. Rather than leave unresolved issues to “commercial negotiations,” the Associations suggest that the Commission move forward with a proceeding to address IP-to-IP technical standards to avoid uncertainty and conflicting policies.

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## **CERTIFICATE OF SERVICE**

I, Adrienne L. Rolls, certify that a copy of the foregoing Reply Comments of the National Telecommunications Cooperative Association and the Organization for the Promotion and Advancement of Small Telecommunications Companies in WC Docket No. 11-119, DA 11-1198, was served on this 30<sup>th</sup> day of August 2011 by first-class, United States mail, postage prepaid, or via electronic mail to the following persons:

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